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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

JOHN HUDSON, LARRY BARESEL,
and JACK BUTLER RACKLEY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Are civil monetary sanctions remedial for purposes of the Double Jeopardy Clause when the sanctions are not based upon any harm, damage, or cost to the United States Government and will not compensate the victim of the offense for which the sanctions were imposed?

Is the Double Jeopardy Clause implicated by a civil monetary punishment which precedes a criminal indictment?

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF seeks to promote and protect the free

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in (continued...)

enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to protecting the rights of individuals and businesses in administrative proceedings, and curbing excessive government regulation of business through civil and criminal proceedings, by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. See, e.g., *United States v. McAusland*, 979 F.2d 970 (4th Cir. 1992), *cert. denied*, 507 U.S. 1003 (1993); *Reich v. Arcadian Corp.*, ___ F.3d ___, No. 96-60126 (5th Cir. April 28, 1997). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

WLF believes that the decision below was a significant departure from the law as stated by this Court in *United States v. Halper*, 490 U.S. 435 (1989), and other cases construing the Double Jeopardy Clause, and the decision below conflicts with that of the United States Court of Appeals for the Seventh Circuit in *S.A. Healy Co. v. Occup. Safety and Health Review Comm.*, 96 F.3d 906 (7th Cir. 1996). If left intact, the Tenth Circuit's decision will allow government agencies to impose successive multiple punishments upon individuals and businesses by nominally labeling the proceedings as civil, and by using after-the-fact justifications to characterize a sanction as remedial even though it was intended to punish the defendant. Such a rule would destroy a defendant's constitutionally protected expectation of finality in a punishment, allow the Government to bring multiple actions to punish defendants merely because the Government is dissatisfied with the sentence first rendered, and entangle

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[1](...continued)
whole or in part.

defendants in multiple costly trials. These increased costs to businesses will ultimately be borne by consumers, workers, and society as a whole.

WLF is filing this brief with the consent of Petitioners and Respondent. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

The Petitioners, John Hudson ("Hudson"), Larry Baresel ("Baresel"), and Jack Butler Rackley ("Rackley"), were officers or directors of one or more of several banks acquired by petitioner Hudson. During 1986 and 1987, the United States Department of Treasury, through its Office of the Comptroller of the Currency ("OCC"), issued Reports of Examination ("ROA's") alleging that Petitioners violated federal statutory prohibitions on "insider" or "nominee" lending.

As a result, in 1989, OCC initiated two adversary proceedings against Petitioners. First, OCC sought to impose "assessments" of $100,000 against petitioner Hudson and $50,000 each against Petitioners Baresel and Rackley, pursuant to 12 U.S.C. §§ 93(b) and 504. Second, OCC sought to prohibit Petitioners from participating in the affairs of federal insured financial institutions, pursuant to 12 U.S.C. § 1818(e) and (i). OCC's "notice of assessment of a civil money penalty" stated that the money penalties were imposed pursuant to 12 U.S.C. §§ 93(b) and 504 for violations of 12 U.S.C. §§ 84 and 375(b), and, that the amount of the penalties was determined based upon, *inter alia*, "the gravity of the violations [asserted against petitioners and] the history of previous violations . . . " App. at 89a.

The monetary sanctions were therefore based upon the asserted magnitude and egregiousness of the Petitioners' violations and the amount of damage caused to the banking institutions involved. OCC did not assert any loss or damage to the Government as the basis for the sanctions. Petitioners entered into a consent decree with the Government providing for reduced fines of $44,000, but the reduced amount again was not based upon any cost or injury to the Government.

In 1992, the United States Government indicted Petitioners for the same conduct for which it had previously imposed monetary sanctions. Petitioners moved to dismiss the indictment on the grounds that it was barred by the Double Jeopardy Clause of the Fifth Amendment. The district court denied the motion by unpublished order, and Petitioners timely appealed.

The United States Court of Appeals for the Tenth Circuit affirmed the district court's determination that the non-participation sanctions were not punishment within the meaning of the Double Jeopardy Clause, but held that the monetary sanctions appeared, *prima facie*, "to be designed, at least in part, to punish and deter improper conduct." App. at 80a. The court of appeals remanded to the district court to "determine the precise injury caused to the government for which the sanctions are the remedy . . . . " *id.*, and instructed the district court to dismiss the indictment unless the sanctions were solely remedial. *Id.* (*citing Halper*, 490 U.S. at 452).

On remand, the district court conducted an evidentiary hearing concerning the nature of the fines and the Government's costs and damages. The district court found, based upon the Government's evidence, that the fines were

imposed to provide general and specific deterrence, and were based upon a penalty matrix which considered the willfulness, number and duration of violations, concealment of violations, and the existence of prior violations by Petitioners. App. at 13a-14a. The district court further found that the costs to the Government of investigation and prosecution were not considered in setting the sanctions, and that the Government was not a victim of Petitioners' conduct. *Id.*

The Government did not put on any evidence to demonstrate that it considered, or could have considered under its statutory authority, its costs and damages in setting the penalty, but it alleged that it had incurred $72,000 in "investigative costs." This contention was based upon an *ex post* estimate prepared by attributing a portion of OCC employee salaries to time spent in the investigation of Petitioners. The district court dismissed the indictment because the sanctions were based entirely upon punitive concerns and did not provide a remedy for the Government. App. at 14a.

The Government then appealed to the Tenth Circuit, and a differently constituted panel reversed the district court's dismissal of the indictment. App. at 8a. The court of appeals, ostensibly relying on *Halper's* gross disproportionality requirement, held that the total fines eventually imposed of $44,000 were not disproportionate to the "proven damages" to the Government of $72,000. *Id.* Petitioners timely petitioned for a writ of certiorari, which this Court granted on April 14, 1997.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision in *Hudson II* would improperly permit the United States Government to punish the Petitioners twice for the same conduct. The lower court reached this result by allowing Respondent to rationalize the first punishment on a basis which was demonstrably fictitious, specifically, that the civil monetary sanctions at issue were not intended to punish the defendants but were merely to provide a remedy to the Government. This rationale was a fiction because Respondent conceded it was not a victim of the Petitioners' conduct, and the civil monetary fines were not and could not have been based upon Respondent's damages or costs. To the contrary, the sanctions were not based upon its costs of detection or investigation, and evidence of Respondent's costs was introduced merely as an after-the-fact rationalization of the penalty. This ruling was contrary to the law as stated by this Court in *Halper*, conflicts with the Seventh Circuit's decision in *Healy*, and represents a significant expansion of the Government's ability to punish defendants in successive proceedings by nominally labeling the proceedings as "civil" and justifying the penalties imposed with fictitious after-the-fact rationales.

This Court has recognized that civil penalties which constitute punishment implicate the Double Jeopardy Clause. *Halper*, 492 U.S. at 448-49. A nominally civil penalty may constitute punishment under the Double Jeopardy Clause when the purpose and effect of the statute is to impose punishment, *e.g.*, *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), or, when the penalty imposed is so grossly disproportionate to the damages incurred that the sanction constitutes punishment. *Halper*, 492 U.S. at 452. The Double Jeopardy Clause therefore prohibits the successive use

of civil punishments as defined by reference to either the intended effect of the statutory scheme or the actual punishment imposed.

This limitation on the Government's ability to impose multiple punishments is supported by sound policy considerations. Under Respondent's view of the Double Jeopardy Clause, government agencies can bring repeated actions against a defendant based on the same conduct, as long as the proceedings are nominally civil, until the Government is satisfied with the penalties imposed or the penalties become grossly disproportionate to the Government's damages. Such an approach would destroy the defendant's expectation of finality in a punishment, and impose untold costs upon persons and businesses facing the threat of successive civil actions by government. Moreover, Respondent's argument would set a dangerous precedent by allowing the Government to justify its actions with fictitious after-the-fact rationales for the actions it had taken.

Because of the increased availability to federal and state governments of parallel civil and criminal sanctions for the same conduct, and the dramatic increase in parallel proceedings brought by government regulatory agencies, the Court's decision will have a significant impact on the conduct of the Government in enforcing laws backed by civil and criminal penalties. The Tenth Circuit's decision would effectively eliminate any double jeopardy protection for regulated persons and industries as long as the Government denominates its proceedings as civil. For these reasons and the reasons set forth below, the Washington Legal Foundation ("WLF") respectfully urges this Court to reverse the decision below.

ARGUMENT

I. THE DOUBLE JEOPARDY CLAUSE PROHIBITS MULTIPLE PUNISHMENTS, INCLUDING CIVIL SANCTIONS WHICH ARE NOT BASED UPON THE COSTS OR INJURY OF A DEFENDANT'S CONDUCT TO THE GOVERNMENT.

The Double Jeopardy Clause prohibits multiple punishments imposed in separate proceedings for the same offense. *Kurth Ranch*, 114 S.Ct. at 1941 n.1; *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). In this case, the United States Government has commenced separate civil and criminal proceedings against Petitioners. The second proceeding is criminal, and there is no dispute that it implicates the Double Jeopardy Clause; the dispute in this case concerns whether the first proceeding was undertaken to punish the Petitioners; if it was, then the criminal indictment constitutes a second jeopardy and is barred by the Double Jeopardy Clause.

The prior decisions of this Court firmly establish that the label of a civil or administrative proceeding as such does not determine whether the action was intended to punish a defendant. *See, e.g., Kurth Ranch*, 114 S.Ct. at 1945 ("[a] defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding."); *Halper*, 490 U.S. at 447. Instead, this Court has directed the lower courts to consider both whether the statute involved was intended to provide a civil or criminal sanction, whether the purpose or effect of the statute was to punish the defendant, and whether the sanction actually imposed was so disproportionate to the Government's damages as to render it punitive

notwithstanding the remedial intent of the statute. If the sanction fails any of these criteria, then the sanction constitutes a punishment and implicates the Double Jeopardy Clause.

A. A Civil Sanction Cannot Be Deemed Remedial When It Is Based Upon A Statutory Penalty Scheme Which Does Not Provide Compensation to the Victim or Take Into Account The Government's Damages and Investigative Costs.

The statute under which Petitioners were sanctioned was intended to punish those who violate its provisions. The penalty provisions of the statute make no provision for consideration of any harm, damage or cost to the Government; instead, the penalties are based upon the size of the business of the violator, the violator's good faith, the gravity of the harm caused, and the violator's history of prior violations. 12 U.S.C. § 93(b). The statute further allows consideration of "such other matters as justice may require", but makes no provision for the Government's harm or damages, or for the costs of investigation and prosecution.[2] Penalties imposed under the statute are *in personam* civil penalties.

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[2] During the evidentiary hearing which the district court conducted after the remand from *Hudson I*, Respondent put on its evidence of its costs of investigation, detection and prosecution. Respondent's witness, Daniel Stipano, an attorney and Director of the Enforcement and Compliance Division of OCC, conceded that the Government had no legal authority under the statute to demand restitution in setting the penalty. App. at 27a-28a, 33a.

In *Halper*, this Court addressed whether civil *in personam* penalties imposed under the False Claims Act constituted a punishment and thereby violated the Double Jeopardy Clause. The False Claims Act specifically provided for consideration of the Government's costs of investigation and prosecution in setting the fine. *Halper*, 492 U.S. at 438. Despite the fact that the United States was the victim of Halper's violations, and the statute allowed consideration of the Government's loss in setting the fine, this Court held that the fines imposed violated the Double Jeopardy Clause because they were grossly disproportionate to the Government's damages. *Halper*, 492 U.S. at 452.

The penalties imposed in this case differ from those in *Halper*, but in a manner which makes them even more clearly violative of the Double Jeopardy Clause. First, the Government was not a victim of Petitioners' conduct, and therefore the penalties imposed cannot be justified as a remedy for the Government. Second, unlike the False Claims Act at issue in *Halper*, the statute under which Petitioners' were penalized makes no provision for the Government's costs of investigation or prosecution, and is therefore not intended to make the Government whole. To the contrary, the penalties are based upon the defendant's size, the gravity of the violations, the history of the violations, and the defendant's good faith.[3] 12 U.S.C. § 93(b).

The fact that the costs of prosecution and investigation may have, by coincidence, and when viewed after the fact,

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[3] As Petitioners point out, the penalty matrix is indistinguishable from the sentencing matrix used in the Sentencing Guidelines for federal criminal defendants. *See Nichols v. United States*, 511 U.S. 738 n.3 (1994).

exceeded the penalties imposed, cannot justify the penalties as remedial. The Double Jeopardy Clause is intended to protect a defendant's interest in the finality of a sentence and to avoid the expense, embarrassment, and anxiety of successive trials. *Morris v. Mathews*, 475 U.S. 236, 247 (1986); *United States v. DiFrancesco*, 449 U.S. 117, 127 (1980). The civil proceeding against Petitioners constituted a jeopardy when it occurred because, under the statute, the proceeding was -- indeed, had to have been -- intended to punish the Petitioners, not to provide Respondent a remedy. That Respondent explains after-the-fact that the penalties did not exceed its costs cannot undo the jeopardy which had already attached. *Cf. Kurth Ranch*, 114 S.Ct. at 1948 (state's initiation of proceeding to collect tax on possession of drugs was "functional equivalent of a successive criminal prosecution that placed . . . [the defendants] in jeopardy a second time 'for the same offense'.").

Moreover, although recovery of the costs of investigation and prosecution might be considered compensatory in the sense that it assists Respondent in breaking even, the penalties cannot be remedial because Respondent was not the injured party and the penalties produced no benefit to the victims of Petitioners' conduct. *Healy*, 96 F.3d at 910. Instead, the penalties provided specific and general deterrence, the standard objectives of the criminal law.

Respondent contends that *Halper* is both the beginning and the end of this Court's limitation on civil monetary penalties under the Double Jeopardy Clause.[4] According to Respondent, *Halper* and subsequent forfeiture cases of this

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[4] *See* Respondent's Brief in Support of Petition for Writ of Certiorari at 9-12.

Court stand for the proposition that only those civil penalties which are in fact grossly disproportionate to the Government's costs and damages constitute double jeopardy punishment. Because the sanctions on Petitioners were not in fact grossly disproportionate to Respondent's claimed costs, Respondent contends that is enough to pass double jeopardy muster.

However, a review of this Court's decisions demonstrates that gross disproportionality is not the sole double jeopardy limitation on civil punishment; instead, *Halper* is an additional limitation which addresses the rare case in which the penalty is grossly disproportionate to the Government's costs and damages, even though the fine was intended to be based upon the harm and cost to the Government. Where, as in this case, the penalty was not and could not have been based upon the harm or cost to Respondent, the penalty constitutes punishment regardless of whether it is grossly disproportionate to the Government's alleged costs.

Even prior to *Halper*, this Court had consistently recognized that civil proceedings may violate constitutional protections generally afforded only to criminal defendants. For example, in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court considered whether revocation of citizenship as a sanction for draft avoidance constituted punishment for purposes of implicating a defendant's right to counsel and other constitutional protections.[5] The Court found that the statute was intended to punish violators, and therefore defendants were entitled to constitutional protections such as the right to counsel. Following *Kennedy*,

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[5] The Double Jeopardy Clause was not at issue in *Kennedy*. 372 U.S. at 165-68.

the Court employed a two-level inquiry in *United States v. Ward*, 448 U.S. 242 (1980), to determine whether a statutory penalty imposed under the Clean Water Act was civil or criminal for purposes of the Fifth Amendment's guarantee against compulsory self-incrimination. The Court did not limit its review to disproportionality, but rather asked whether: 1) Congress expressly or impliedly indicated a preference for the characterization as civil or criminal; and 2) if Congress intended to establish a civil penalty, "whether the statutory scheme [is] so punitive either in purpose or effect as to negate that intention." *Id.* at 248-49.

This Court then applied and refined the *Kennedy-Ward* analysis in the context of a forfeiture proceeding in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). Chief Justice Burger, writing for a unanimous Court, considered whether the forfeiture proceeding was "intended to be, *or by its nature necessarily is*, criminal and punitive, or civil and remedial (emphasis added)." *Id.* at 362. Noting that resolution of that question begins as a matter of statutory construction, the Court applied the *Ward* analysis to 1) "'determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other'"; and 2) "'whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.'" *Id.* at 362-63 (*quoting Ward*, 448 U.S. at 248). The Court also stated that the considerations set forth in *Kennedy* were "helpful" in this analysis. *89 Firearms*, 465 U.S. at 365.[6] Applying the *Ward* analysis to

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[6] The *Kennedy* factors are:

Whether the sanction involves an affirmative disability

(continued...)

the forfeiture at issue, the Court held that the forfeiture did not constitute punishment.

Viewed in the light of this background, it becomes clear that this Court's 1989 decision in *Halper* did not dispense with, but rather added to the double jeopardy protection the Court had previously recognized for nominally civil sanctions. In *Halper*, it was undisputed that the statute at issue, the civil False Claims Act, was intended to provide a civil sanction as a remedy. The False Claims Act specifically authorized damages to compensate the Government for its costs and injury,[7] and in that case the Government was the victim of Halper's fraud. The issue presented in *Halper* was whether the punishment exacted, potentially over $130,000 for a $585 fraud, constituted double jeopardy punishment even though the statute was intended to provide remedial

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[6](...continued)
or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .

Kennedy, 372 U.S. at 168-69 (footnotes omitted).

[7] *See* 31 U.S.C. § 3729 (following the 1986 amendments, the statute provided for liability of $2,000 per violation, an amount equal to two times the amount of damages the Government sustained because of the violator's acts, and the costs of the civil action).

relief. This Court held that the penalty constituted punishment because it was "grossly disproportionate" to the harm to the Government. *Halper*, 495 U.S. at 452. The Court thereby recognized an additional level of double jeopardy protection for defendants in nominally civil proceedings, *viz.*, whereas under *Kennedy*, *Ward*, and *89 Firearms*, the statute must be intended as remedial and be remedial in purpose and effect, under *Halper* the penalty must also be not grossly disproportionate to the harm, even if the test of *Kennedy*, *Ward* and *89 Firearms* is met.

This Court's analysis in two post-*Halper* cases, *Kurth Ranch*, 114 S.Ct. at 1948, and *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996), further demonstrates that a civil monetary sanction must be remedial both by reference to the statutory intent, purpose and effect of the sanction, and to its proportionality. In *Kurth Ranch*, the Court held that a tax assessment based on Montana's Dangerous Drug Tax Act constituted punishment for purposes of the Double Jeopardy Clause. The Court acknowledged that it was inappropriate to apply *Halper*'s analysis to a state drug tax, *Kurth Ranch*, 114 S.Ct. at 1948, but the Court nonetheless held that the tax imposed a double jeopardy punishment because as a matter of statutory construction, the intent, purpose and effect of the statute was to impose punishment. *Kurth Ranch*, 114 S.Ct. at 1945-49.[8]

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[8] As noted *infra* at 17, the Court so held without discussing or even citing its prior decisions in *Kennedy* and *Ward*, thereby demonstrating that although *Kennedy* and *Ward* were not strictly applicable, a civil sanction could constitute punishment even without gross disproportionality.

The Court's analysis in *Kurth Ranch* bears on this case in two important ways. First, in construing the statute, the Court reiterated what it had previously stated in *Halper*, that the statutory label as criminal or civil was not of paramount importance. *Id.* at 1945. Second, the Court determined whether the tax statute imposed punishment not simply by reference to whether the actual tax imposed was in fact grossly disproportionate, but rather by considering the purpose and effect of the statute. Emphasizing that the tax statute imposed liability for criminal conduct, and was assessed upon goods which the taxpayer did not lawfully possess, the Court held that the tax constituted a punishment. *Id.* at 1947-48.[9]

In *Ursery*, the Court distinguished both the *Halper* gross disproportionality analysis and the *Kennedy-Ward-Kurth Ranch* statutory purpose and effect analysis as applied to *in personam* sanctions to hold that civil *in rem* forfeitures were not punishment for double jeopardy purposes. *Ursery*, 116 S.Ct. at 2149. The Court emphasized the unique nature of civil *in rem* forfeitures, and observed that Congress had authorized parallel forfeitures and criminal prosecutions since the earliest years of the Nation with the Court's approval. *Id.* at 2140. Further, the Court expressly distinguished *Halper* and *Kurth Ranch* as cases involving *in personam* civil penalties, which presented a "sharp distinction" from *in rem* civil forfeitures. *Id.* at 2141, 2143-44.

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[9] Of further import for this case, as discussed *infra*, the Court rejected the possibility that the tax could be justified as remedial, stating: " . . . the formula by which Montana computed the tax assessment would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all." *Id.* at 1948.

To summarize, this Court's double jeopardy jurisprudence establishes several principles which demonstrate that the decision below was incorrect. First, double jeopardy analysis of civil sanctions is not limited to gross disproportionality. Second, in addition to the disproportionality limitation, the Court must also consider the intent, purpose and effect of the statute upon which the sanctions were based. Third, in making this analysis, the label as civil or criminal is not of paramount importance. Fourth, the Court must consider the statutory scheme and examine the circumstances in which the sanction may be imposed and the factors upon which the sanction may be based. Moreover, none of this Court's decisions hold that a sanction intended as punishment may be justified after the fact by demonstrating that the sanction imposed was coincidentally proportionate to the Government's costs.

Under the Court's decisions, it is not clear whether the analytical framework for this case is found in *Halper*, or the *Kennedy*, *Ward*, and *89 Firearms* cases, or somewhere else. *Compare, e.g.*, *Halper*, 490 U.S. at 447 (*Ward* approach "not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments."); *Austin v. United States*, 509 U.S. 602 n.6 (1993) (stating that *Halper* is now the point of reference for determining punishment, and not *Kennedy* and *Ward*); *Kurth Ranch*, 114 S.Ct. at 1948 (distinguishing *Halper* as inapplicable to a tax case but finding that tax constituted punishment without discussing or citing *Kennedy* and *Ward*); *Ursery*, 116 S. Ct. at 2145, 2147 (distinguishing *Halper* and applying *89 Firearms* as "useful analytical tool" to find forfeiture did not constitute punishment). Regardless of which framework the Court looks to, the answer in this

case is the same: the sanctions imposed in this case constituted punishment.

The proper application of the double jeopardy analysis leads to the conclusion reached by the *Healy* court, that the monetary sanctions imposed upon Petitioners were punishment for their offenses. The sanctions were punishment because they were based upon, and could only have been based upon, factors which were unrelated to remedial concerns such as Respondent's damages and costs of detection, investigation and prosecution. *See Ursery*, 116 S.Ct. at 2157 (Stevens, J., dissenting) ("[t]here is no need to determine whether a statute that is punitive by design has a punitive effect when applied in the individual case."). The sanctions were based upon factors relating to the egregiousness of Petitioners' conduct, and their ability to pay, which are matters of specific and general deterrence. *Halper*, 490 U.S. at 448 ("[r]etribution and deterrence are not legitimate nonpunitive governmental objectives." (citation omitted)).

B. The Double Jeopardy Clause Violation Does Not Depend Upon Whether The Government Imposed Civil Punishment Before Or After It Sought to Impose Criminal Punishment.

The successive actions against Petitioners in this case cannot be justified on the basis that the civil action was concluded first, in contrast to *Halper* in which the criminal action was concluded first. The pertinent question is whether the penalty imposed was punishment, and there is no principled basis for the answer to that question to depend on whether it was imposed in the first or second proceeding. *Ursery*, 116 S.Ct. at 2161 (Stevens, J., concurring in the

judgment in part and dissenting in part) ("[t]he prohibition against two such proceedings cannot depend on the order in which they are filed."); *Kurth Ranch*, 114 S.Ct. at 1957 (Scalia, J., dissenting) (" . . . if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference.").

Although this Court has not squarely addressed that question, lower federal courts have generally agreed that the order of the proceedings cannot matter. *See, e.g., United States v. Tilley*, 18 F.3d 295 n.5 (5th Cir. 1994) ("[r]egardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will bar the second sanction if both the first and second sanctions are deemed punishment"); *United States v. Furlett*, 974 F.2d 839 n.2 (7th Cir. 1992) ("no reason for holding that *Halper* should apply only to civil proceedings that post-date criminal ones"); *United States v. Walker*, 940 F.2d 442, 443 n.2 (9th Cir. 1991) (same); *United States v. Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) (fact that civil penalties were imposed before criminal trial irrelevant for double jeopardy analysis); *United States v. Mayers*, 897 F.2d 1126, 1127 (11th Cir.) (per curiam) (*Halper* principle applies whether civil penalty or criminal punishment comes first), *cert. denied*, 498 U.S. 865 (1990).

C. The Civil Sanction Cannot Be Justified As Remedial On The Basis Of The Government's Subsequent, Fictitious, And Wholly Coincidental Rationale.

This Court should not countenance Respondent's fictitious *ex post* rationale that the sanctions imposed were remedial because they approximated or were less than the Respondent's costs. Respondent concedes that it was not the victim of the Petitioners' conduct, and that it did not and could not consider its costs of investigation and prosecution when imposing or reducing the sanctions. Therefore, Respondent's costs were unrelated to the sanctions imposed, and whatever approximation the sanctions had to Respondent's costs was purely coincidental.

In *Kurth Ranch*, the Court rejected a similar contention, stating, " . . . in any event, the formula by which Montana computed the tax assessment would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all." *Kurth Ranch*, 114 S.Ct. at 1948. Thus, the Court rejected the argument that the coincidental approximation of the Government's costs to the tax imposed could classify the tax as remedial, and the Court held that the tax constituted a punishment within the meaning of the Double Jeopardy Clause.

Similarly, in *Austin*, the Court held that a forfeiture was subject to the Eighth Amendment's Excessive Fines Clause, and in so holding the Court rejected the Government's argument that the forfeitures served as a reasonable form of liquidated damages. *Austin*, 113 S.Ct. at 2811. Citing *Ward*, the Court stated, "the 'forfeiture of property . . . [is] a penalty that ha[s] absolutely no correlation to any damages sustained

by society or to the cost of enforcing the law.'" *Austin*, 113 S.Ct. at 2812. Thus, the Court has rejected the Government's attempts to classify as remedial those punishments which approximate the Government's damages and costs only through coincidence. Moreover, such a rationalization is inconsistent with this Court's decisions in *Kennedy*, *Ward*, and *89 Firearms*, each of which analyzed the statutory purpose in order to determine whether the statute imposed a punishment.

II. THE DOUBLE JEOPARDY PROTECTION RECOGNIZED BY THE SEVENTH CIRCUIT'S DECISION IN *HEALY* IS NECESSARY GIVEN THE INCREASED AVAILABILITY AND USE OF PARALLEL CIVIL AND CRIMINAL PENALTIES AGAINST REGULATED PERSONS AND INDUSTRIES.

A. The *Healy* Decision Properly Addresses The Reality That Government Might Punish Defendants Through Ostensibly Civil Proceedings.

The result as set forth in *Healy* is necessary to prevent the Government from bringing successive punitive actions because it is dissatisfied with the results from the first action, and to protect defendants from suffering the time, expense, frustration, and threat of successive punitive actions. Respondent's argument, if adopted, would have serious and detrimental consequences for all persons and industries regulated by laws providing both civil and criminal penalties. As the *Healy* Court stated:

> If the Secretary's understanding is correct, then there is not much left of the double

> jeopardy clause. Additional federal agencies furthering their own agendas may conduct their own investigations. The multiplying costs of the investigations become the justification for still more proceedings and the imposition of additional fines. . . . [the defendant] could be dogged for eternity by additional penalties for the same misconduct. This the double jeopardy clause does not allow.

Healy, 96 F.3d at 910.

Further, Respondent's argument, if adopted, would allow it to first initiate civil actions which have the threat of criminal penalties (*i.e.*, penalties in excess of and unrelated to the Government's harm), but which lack the protections provided to defendants in criminal actions. Then, if the Government is dissatisfied with the result of the civil action, it could justify the penalties as merely remedial and initiate a criminal prosecution, or, as the *Healy* Court noted, initiate successive civil actions until it is satisfied with the quantum of damages. *Halper*, 490 U.S. at 451 n. 10 ("On the other hand, when the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding.").

In contrast, the analysis WLF proposes would not impair the Government's ability to fully regulate business conduct and prosecute crimes. The Government would merely be precluded from attempting to obtain penalties unrelated to its

costs and damages in two separate proceedings. *See, e.g., Healy*, 96 F.3d at 911 ("Imposed in a single proceeding, the criminal and administrative fines would not have been problematic, for the double jeopardy clause allows multiple punishments if there is only one 'jeopardy'" (citation omitted)). Further, the Government could still initiate successive proceedings to obtain remedial relief. For example, the Government could obtain suspension of a drunk driver's driving license in order to keep the driver off the streets and then bring a subsequent criminal prosecution. *See, e.g., Ursery*, 116 S.Ct. at 2161 n. 16 (Stevens, J., dissenting); *Healy*, 96 F.3d at 911. The rule of *Healy* also does not preclude an injured party from bringing a private civil action in its own right to obtain compensation from the violator.

State and federal regulatory schemes now commonly provide both civil and criminal sanctions for violators, affording government agencies multiple bites at the punishment apple.[10] Moreover, those sanctions, even if entitled "civil", are of increasing severity. *See* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325-27, 1333-34 (1991) (describing current trend of using civil remedies to complement criminal law enforcement); Peter J. Henning, *Precedents in a Vacuum: The Supreme Court*

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[10] For example, numerous federal statutes and administrative regulations permit both civil and criminal proceedings, including: the Sherman Act, 15 U.S.C. §§ 1-3, 15, 15(a) (antitrust); the Internal Revenue Code, 26 U.S.C. § 7201; the Securities Act of 1933, 15 U.S.C. § 77t; and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68.

Continues to Tinker With Double Jeopardy, 31 AM.CRIM.L.REV. 1, 4-5, 34,35 (1993) (describing overlapping penalties); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1796-98, 1800-01, 1844, 1849-54 (1992) (describing increased role of punitive civil sanctions in law enforcement and noting that such sanctions are often more severely punitive than the parallel criminal sanctions for the same conduct).

The increased availability, use, and severity of such "civil" sanctions merits this Court's close attention to the practical implications of this case. The Government should not be permitted to seek what is essentially criminal punishment through civil proceedings which deny defendants their constitutional rights. *See* Mann, *supra*, at 1798, 1801, 1849 (noting that punitive civil sanctions have become cheaper and more efficient for Government than criminal sanctions because they are not constrained by criminal procedure); *cf. Smith v. Dep't of Human Servs.*, 876 F.2d 832, 836 (10th Cir. 1989) (purpose of liquidated damages provision in Age Discrimination in Employment Act was to avoid procedural difficulties that would come with a criminal penalty). Our legislatures may permit the Government to regulate the affairs of persons and industries with the threat of punishment, but the Double Jeopardy Clause does not permit the Government to seek multiple successive punishments for the same offense regardless whether the punishments are imposed through either civil or criminal proceedings.

B. The Rule Of *Healy* Does Not Require The Lower Courts To Make An Inappropriate Inquiry Into The Subjective Motivations Behind A Government Prosecution.

Contrary to Respondent's argument, the analysis WLF proposes as set forth in *Healy* would not improperly lead the lower courts into a subjective inquiry of the motives lying behind a civil action. Respondent contends that Petitioners' argument, and the *Healy* court's decision, improperly requires a subjective inquiry into the purpose of a civil action.[11] However, the *Healy* analysis requires only a straightforward construction of the relevant statute and the agency's implementing policies. To that extent, the inquiry is no more subjective than is any court's construction of a statute or an agency policy.

Nothing in *Healy* requires the lower courts to determine the actual motivations of individual agency officials in bringing an action. Instead, *Healy* stands for the common sense proposition that where, as here, the terms of the statute and the agency's policies demonstrate that the Government's costs are not considered in imposing a penalty, that penalty cannot be justified by its coincidental relationship to the Government's costs. *Healy*, 96 F.3d at 910-12.

To the extent the *Healy* analysis requires lower courts to consider the intent of Congress and the purpose of the legislative scheme, that inquiry accords with this Court's double jeopardy jurisprudence. *Ursery*, 116 S.Ct. at 2147-48, n.3 (first step of *89 Firearms* analyis is whether Congress

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[11] *See* Respondent's Brief in Support of Petition for Certiorari at 7-8.

intended proceeding to be civil or criminal; second step is whether proceeding is punitive in purpose or effect); *Kurth Ranch*, 114 S.Ct. at 1947-48 (tax was "motivated" by a "penal and prohibitory intent" and thus was functional equivalent of a successive criminal prosecution); *89 Firearms*, 465 U.S. at 362 ("Unless the forfeiture sanction was *intended* as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. The question, then, is whether a . . . forfeiture proceeding is *intended to be, or by its nature necessarily is*, criminal and punitive, or civil and remedial" (emphasis added) (citations omitted).

CONCLUSION

For the foregoing reasons, WLF respectfully requests that this Court reverse the decision of the Tenth Circuit.

Respectfully submitted,

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